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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942

Nos. 642 and 643

IN THE MATTER OF 4145 BROADWAY HOTEL COMPANY, A CORPORATION,

Debtor

(C.C.A. Case No. 7888)

F. GERALD THOMAS,

Petitioner

vs.

THE UNITED STATES OF AMERICA,

Respondent

(C.C.A. Case No. 7891)

F. GERALD THOMAS,

Petitioner

vs.

GEORGE W. ROSSETTER, JAY C. McCORD AND MAURICE A. ROSENTHAL, STOCK TRUSTEES,

Respondents

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

REPLY BRIEF FOR PETITIONER.

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INDEX.

PAGE

"Statement of the case" 1-3
(Brief for Respondents, 1-3)

"Former adjudications" 3-6
(Brief for Respondents, i, 3-4)

"No reason for allowance of certiorari" 6-7
(Brief for Respondents, 4-6)

Conclusion 7-8

Table of Cases.

Bakers Share Corp. v. London Terrace, Inc., 130 Fed. 2nd. 157 2

In re 4145 Broadway Hotel Company, 100 Fed. 2nd. 7 5

In re 4145 Broadway Hotel Company, 117 Fed. 2nd. 639 2

In re Flatbush Avenue-Nevins Street Corporation, C.C.A., 2nd Cir. Jan. 8, 1943, not yet reported..... 7

White v. Higgins, 116 Fed. 2nd. 312..... 6

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"Statement of the Case."

(Brief for Respondents, 1-3)

It is untrue (Respondents' Brief, p. 2, lines 10-12, 21) that petitioner "flagrantly and persistently disregarded the injunction order ever since it was entered," or "brazenly continued to flaunt the injunction."

Petitioner was first charged with violation of the injunction in the trustees petition of June 17, 1940 (Trans. 7497, pp. 17-27), on which the decretal order of August 6, 1940 (Trans. 7497, pp. 159-163), was entered. *In re 4145 Broadway Hotel Co.*, 117 Fed. 2nd. 639. That petition did not allege or identify a single act of your petitioner as done on or after May 26, 1938, and prior to June 23, 1938, on which latter date your petitioner contends the injunction had already expired. The various letters of petitioner attached to the petition as exhibits are dated on or after May 8, 1940 (Exhs. A, C, E, F, G and N, Trans. 7763, pp. 28, 37, 43-46), all of them, in the language of *Bakers Share Corp.* v. *London Terrace, Inc.*, 130 Fed. 2nd. 157 (C.C.A. 2, 1942), " 'subsequent transactions' between the parties". And no act of appellant found in the court's separate findings (*Idem.* pp. 150-158) or in the decretal order itself (*Idem.* pp. 159-163) is found to have been committed by Thomas prior to June 23, 1938 or prior to May 1, 1939.

The second and only other charges of contempt, the acts for which your petitioner is now committed to jail, are acts of your petitioner in 1941 (Our Orig. Br. 30; C.C.A. Op., R. 69, lines 2-12; Trans. 7763, pp. 8, 9, 14-15, 27, 59).

It is untrue (Respondents' Brief p. 2, last four lines) that the record herein does not include "the evidence heard by the district court on the petition to punish him (petitioner) for contempt" (Trans. 7763, pp. 64-94; ordered to stand as of record in C.C.A. cases 7888 and 7891, R. 65).

It is untrue (Respondents' Br. p. 3, lines 2-3) that your petitioner "submitted nothing to the reviewing court in challenge of the justice of the order appealed from, or the fairness of the punishment imposed upon him;" and untrue (Respondents' Brief, p. 4, lines 12-6

from bottom) that "appellant raises no question regarding his guilt, but only the question of whether the District Court had jurisdiction to punish him for his violations of the injunction order". Petitioner shows that he never violated the injunction of May 26, 1938, that he was never guilty of any contempt of court and that there was never an act of his for which the court could rightly or justly visit any punishment upon him.

Counsel's statement of the jurisdictional questions (Respondents' Brief p. 3, lines 6-18) is studiedly wrong, —intended to confuse issues they advisedly avoid discussing. See, Our Original Brief pages 46-59.

"Former Adjudications."
(Brief for Respondents, i, 3-4)

Though not questioning that lack of jurisdiction of the subject matter can never be waived and that it is the province of the reviewing Court to determine the trial court's jurisdiction (Our Orig. Brief 41), counsel present (Their Brief, p. 3) another man of straw, namely, that on June 23, 1938, your petitioner moved to "modify" the injunction order of May 26, 1938.

Although otherwise stated by the court in its findings of fact (R. 18, par. 5), there was no motion to "modify" the injunction but a motion to dissolve the injunction. Hearing on that motion started June 22, 1938 (Trans. 6696, p. 68) and continued on June 23, 1938 (Trans. p. 72). Motion denied June 23, 1938 (Trans. 36). Petition for appeal from the injunction of May 26, 1938, was filed June 24, 1938 (Trans. 6696, p. 88).

On that appeal your petitioner's then counsel contended that the order of May 26, 1938, "permanently" enjoining and restraining Thomas "until the further order of this court" (Trans. 7497, p. 10) was a permanent

injunction and therefore beyond the jurisdiction of the trial court. Contrariwise, the trustees insisted (Trans. 7763, p. 50) that the injunction was merely a temporary injunction to preserve the *status quo* of the Thomas proceedings. The Circuit Court of Appeals, **sustaining the trustees' contention**, held that the injunction was a mere temporary injunction to preserve the *status quo* pending contemplated appeal by your petitioner from the order of May 23, 1938, denying your petitioner leave to file his proposed second amended petition. *In re 4145 Broadway Hotel Co.*, 100 Fed. 2nd. 7, 8-9 (See, also, petition for rehearing R. 90-91).

Rehearing having been denied December 14, 1938, by the Circuit Court of Appeals, on February 14, 1939 (R. 36), your petitioner, by his present counsel, petitioned the trial court to vacate the injunction of May 26, 1938, or otherwise hold it for nought (Our Orig. Br., 28, last par.) on the ground that **under the Circuit Court of Appeals decision** the injunction had expired at midnight June 22, 1938. That contention has remained your petitioner's contention ever since.

Another "straw man": Counsel state (Their Br., 4, 1st 3 lines) that no time since April 27, 1939, when the Circuit Court of Appeals denied your petitioner leave to appeal from the refusal of the District Court to vacate or hold for nought the injunction of May 26, 1938, "has the petitioner seen fit to request the District Court to dissolve or modify the injunction order of May 26, 1938." This is another misstatement.

May 3, 1941 (Trans. 7763, p. 47), in answer to the trustees' petition of April 18, 1941 (Trans. 7763, p. 6), upon which your petitioner was committed December, 1941, for contempt of court (R. 46), your petitioner urged in detail and at length (Trans. 7763, pp. 48-53) his

position and the reason for his position that the injunction of May 26, 1938, expired or ceased to be effective at midnight June 22, 1938; and plead (Trans. 7763, p. 53, lines 6-10) "that as to the order herein of March 20, 1939 [denying petitioner's petition of February 14, 1939, to the trial court to vacate the injunction of May 26, 1938, or otherwise hold it for nought], on the petition of this respondent, this respondent refers to and adopts as a part hereof said petition filed herein by this respondent on or about said last-mentioned date,"—referring to his very petition of February 14, 1939.

And on November 26, 1941 (Trans. 7888, p. 13) your petitioner moved the court (1) to vacate the decretal order of August 6, 1940, and (2) vacate so much of said order as finds or decrees or is on the face of said order basis for finding or decree that the injunction order entered herein May 26, 1938, was on August 6, 1940, in full force and effect, that said Thomas had theretofore violated said injunction order of May 26, 1938, that said Thomas obtained powers of attorney through material misrepresentation, that powers of attorney obtained by said Thomas since May 26, 1938, were void and of no force or effect, etc., etc. (Trans. 7888, p. 14).

Tho not mentioned in their brief itself, in their summary of argument (Their Br. i, first par.) counsel say that by reason of the decision on the first appeal (*In re 4145 Broadway Hotel Company,* 100 Fed. 2nd. 7), "the injunction order itself is no longer open to review."

If so that decision is conclusive not only as to the propriety of the entry of the injunction of May 26, 1938, but as to the nature and effect of that injunction and as to the factual and legal premises of the court upon which it rested its conclusion. And if that is so the injunction restrained petitioner only while appeal from the order of May 26, 1938, was possible (Our Orig. Br. 45-48).

23,

And on this premise of counsel for respondent there is a direct conflict between that decision of the Circuit Court of Appeals and its subsequent decision on the same issues and between the same parties.

And on counsel's same premise, neither the trial court nor the Circuit Court of Appeals had power thereafter to reverse or modify the decision on the first appeal upon any of the subsequent appeals.

The only alternative is that the decisions of the lower courts, whether of the trial court or of the Court of Appeals, are not binding on this Honorable Court (*White* v. *Higgins,* 116 Fed. 2nd. 312, 317); and this Honorable Court has power now to do complete justice in the premises to your petitioner (Our Orig. Br. p. 41).

But the decision of the Circuit Court of Appeals on the first appeal (100 Fed. 2nd 7) cannot be counted upon in support of the contention that the District Court had jurisdiction to award the injunction of May 26, 1938, **as since construed** by the District Court and by the Circuit Court of Appeals for very fact that on the first appeal the Circuit Court of Appeals construed the injunction otherwise **and affirmed the injunction only as so construed on the first appeal.**

"No reason for allowance of certiorari."
(Brief for Respondents, 4-6)

"Reasons Relied on for Allowance of the Writ."
(Our Orig. Brief, 12-14)

If, as counsel assert (Their Brief p. 6, first 3 lines), "the jurisdiction exercised in bankruptcy case No. 56875 since 1935 all traces back to the initiative of F. Gerald Thomas", why from November 1935, to January 24, 1938, when the petitioner first moved for leave to intervene (Our Orig. Br. 22), was no final decree entered?

The fact is that from May 23, 1938, when the District Court dened petitioner leave to intervene (Our Orig. Br. 26), the claimed jurisdiction exercised in the bankruptcy case **"all traces back to"** the determination of respondents and of the trial court not to let F. Gerald Thomas initiate or do anything **either in or out of court** (Our Orig. Br. 35).

The long course of the instant litigation finally puts to the final touch the issue of the jurisdiction of the bankruptcy court in reorganization proceedings after confirmation of the plan of reorganization, and forces the Circuit Court of Appeals for the Seventh Circuit to lengths to sustain the claimed jurisdiction to which no other court in the land has gone. Result, the absurd "operation" theory (Our Orig. Br. pp. 52-54).

The public importance of the Circuit Court of Appeals absurd "operation" theory is emphasized by the decision, January 8, 1943, of the Circuit Court of Appeals for the Second Circuit in *In re Flatbush Avenue-Nevins Street Corporation,* not yet reported. That court holds that no reservations in the order confirming plan of reorganization gives the Bankruptcy Court any jurisdiction with reference to a voting trust, provided for in the plan, to pass upon "subsequent transactions" between the parties. That decision is not only in direct conflict with the decisions of the Circuit Court of Appeals for the Seventh Circuit of which we complain but demonstrates the untold confusion created and endless litigation invited by the last decision herein of the Circuit Court of Appeals for the Seventh Circuit.

According to the decision of the Circuit Court of Appeals of the Second Circuit, the trust involved in the instant case was, admittedly (Trans. 7497, p. 86, 3rd from

last par.), terminated as of May 1, 1939. Yet here we are in 1943 petitioner and his principals deprived of their guaranteed civil rights, their rights of contract, of property, of free speech and of due process by perpetuation of claimed power, denounced by the Circuit Court of Appeals for the Second Circuit, "to remain" to quote that court, "a wet nurse to the reorganized company."

Conclusion.

And in the instant case how "wet" a nurse! Your petitioner may not intervene and be heard in the bankruptcy court, **has no rights in court** (Our Orig. Br. 35). On the sole ground that on April 27, 1938, your petitioner, while his motion for leave to file his second amended petition was pending, but before any restraining order or injunction issued, had written his clients petitioner's letter of April 27, 1938 (Trans. 6696, pp. 5-8), your petitioner is declared and decreed (as the injunction of May 26, 1938, is now construed by the Circuit Court of Appeals) to have **no rights out of court,** his guaranteed civil rights to the contrary notwithstanding. And for how long? Until in its discretion, save the mark, the District Court decides that it is no longer necessary to muzzle petitioner because of his letter of April 27, 1938! Until then, your petitioner is immured in the District Court for the Northern District of Illinois, Eastern Division, sitting in bankruptcy.

Respectfully submitted,

F. Gerald Thomas,
Petitioner.

Lloyd C. Whitman,
Counsel for Petitioner.